Supreme Court, U.S.
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APR 22 1988
JOSEPH F. SPANIOL, JR.
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ACTION NO. 87-1750

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant,

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE KENTUCKY COURT OF APPEALS

JURISDICTIONAL STATEMENT

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April 19, 1988

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QUESTION PRESENTED

Whether Kentucky Revised Statute section 189A.110 is violative of the Fifth, Sixth and Fourteenth amendments to the Constitution of the United States, when applied to prevent a suspect charged with driving under the influence of alcohol from contacting an attorney or obtaining a blood test or other exculpatory evidence, for a period of over four hours after his arrest.

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ACTION NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM IRR, JR.,

Appellant,

v.

THE COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE KENTUCKY COURT OF APPEALS

JURISDICTIONAL STATEMENT

William Irr, Jr., Appellant, appeals from the final judgment of the Kentucky Court of Appeals dated January 8, 1988 (discretionary review denied by Kentucky Supreme Court February 23, 1988), holding that Kentucky Revised Statute section 189A.110, as applied in this case, is not unconstitutional as being violative of Appellant's due process rights to the effective assistance of counsel and to obtain exculpatory evidence on his behalf.

OPINIONS BELOW

Reprinted in the appendix hereto are the following opinions from the courts below:

A. Opinon of the Kentucky Court of Appeals, entered January 8, 1988, (not published) affirming decision of Campbell County, Kentucky Circuit Court;

B. Order of the Kentucky Supreme Court, (not published) entered February 23, 1988, denying discretionary reivew;

C. Opinion of Campbell County, Kentucky Circuit Court, (not published) entered October 22, 1986, affirming Judgment of Campbell County, Kentucky District Court;

D. Judgment and Sentence of Conviction, Campbell County, Kentucky District Court, entered June 23, 1986.

JURISDICTION

The Opinion of the Kentucky Court of Appeals, entered January 8, 1988, held that Kentucky Revised Statute section 189A.110, as applied to Appellant, did not violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Kentucky Supreme Court denied discretionary review of this Opinion, by Order entered February 23, 1988.

A notice of appeal to this Court was filed in the Kentucky Court of Appeals on March 25, 1988.

This appeal is being docketed in this Court within 90 days from the entry of the Order denying discretionary review by the Kentucky Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty or property, without due process of law; . . .

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATUTE FOUND BY COURT BELOW TO BE CONSTITUTINAL

Kentucky Revised Statute section 189A.110:

Any person who is arrested for a violation of KRS 189A.110 and who, upon blood alcohol testing, shows a blood alcohol reading above .15 percent shall be detained in custody at least four (4) hours following his arrest.

* * *

HOW THE FEDERAL QUESTION WAS RAISED

In the District (trial) court, and each subsequent court to which this case was appealed, appellant sought to have his conviction set aside on the grounds that, because he was held *incommunicado* and refused bail for more than four hours after his arrest, he was unable to contact an attorney who could have assisted him in obtaining a blood test, or to place bail and procure such a test himself.

Although appellant claimed throughout the appellate process that K.R.S. 189A.110 was probably unconstitutional, he also asserted that the restrictions of the statute were erroneously applied to him, because he had not had a blood alcohol test (evidence was disputed as to whether he had refused one), and therefore no legislative authority for his four hour hold existed. However, the Kentucky Court of Appeals explicitly applied the statute to him, in the process finding that K.R.S. 189A.110 was not incompatible with the United States Constitution, and rejecting Appellant's federal constitutional claim.

STATEMENT OF THE CASE

Appellant was arrested on the charge of driving under the influence of alcohol on August 27, 1985 at approximately 2:40 a.m. and taken to the Newport, Kentucky police station. There, depending upon the testimony, he either refused, or was denied the opportunity to take a breathalyzer test. He requested the opportunity to call an attorney during the booking procedure, but was told that he would have to wait until he got to jail. After the booking process, Appellant was taken to the county jail and lodged, where he requested of the jailer that he be allowed to take a breathalyzer test. The jailer explained that this would have had to be done by the arresting officer. Appellant then requested to call an attorney. He was informed by the jailer that he could make no call until morning, because the telephones to be used by arrestees were turned off until morning.

Appellant then requested release on bond, and was informed by the jailer that there was a mandatory 4 hour holding period before he would be permitted to obtain release on bond, thereby applying to Appellant the constraints set out in KRS 189A.110. As soon as Appellant was permitted to use the telephone the next morning, he was able to make bond.

Appellant asserted in the trial court that, had he been able to obtain either a telephone call to an attorney or release on bond promptly, he could have, in person or through the attorney, made arrangements to have his blood alcohol content tested, either at a nearby medical facility or at the jail if release was not possible. Such a blood test would have constituted crucial corroborating evidence of Appellant's testifying pharmcologist that, based on Appellant's testimony as to the quantity of alcohol he consumed, his blood alcohol content would have been only about ¼ the presumptive level for intoxication. By the next morning, after the extensive delay caused by the incommunicado hold, such a test would have been meaningless.

At trial on May 14, 1986, Appellant's motion to dismiss on the grounds of denial or destruction of exculpatory evidence

was overruled. The Appellant was found guilty of driving under the influence, and a fine of $250.00 and service fee of $150.00 was imposed by the jury. The judgment and sentence entered pursuant thereto was subsequently upheld by the Campbell County, Kentucky Circuit Court, and the Kentucky Court of Appeals. Discretionary review thereof was denied by the Kentucky Supreme Court on February 23, 1988.

In its opinion affirming the judgment of conviction, the Kentucky Court of Appeals found that, although Appellant did not take a breathalyzer test and therefore did not specifically fall within the wording of KRS 189A.110, which applies to individuals who have registered a blood alcohol test result of more than .15 percent, the statute nevertheless should be applied to Appellant. The court rejected Appellant's assertions that the statute, as applied to him, deprived him of his rights to due process and the effective assistance of counsel.

THE QUESTION PRESENTED IS SUBSTANTIAL

While this court's treatment of the subject of effective assistance of counsel and due process has been extensive, this case raises the important issue of whether a criminal defendant's right to obtain and preserve exculpatory evidence on his own behalf, or to have the assistance of an attorney in doing so for him, may be abridged merely because such defendant may not have fully cooperated with law enforcement officers who are attempting to convict him. It underscores the importance of why, in driving under the influence cases, that right must not be abridged in the crucial few hours following arrest, where delay would result in destruction of exculpatory evidence crucial to a fair trial.

The right of effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution at each stage of the proceedings which are deemed to be a "critical stage" substantially affecting a defendant's right to a fair trial, whether or not that stage is formal, or in court. *United States* v. *Wade*, 388 U.S. 218 (1967).

This right has been dealt with in the context of driving under the influence cases extensively across the country, but with conflicting and confusing results. The Texas Court of Appeals, in *Forte* v. *State*, 686 S.W. 2d 744, 753 (Tex. App. 2 Dist. 1985), reviewed many states' varying approaches with respect to the right to contact a lawyer before deciding whether to take a blood alcohol test. Recognizing the custodial nature of the situation, the importance of the decision, and the far-reaching effect it may have upon an accused's trial, that court found that "it stretches reason to say this is not a critical stage of the pretrial proceeding." *supra* at 754.

Yet the decision of the Kentucky Court of Appeals, appealed from herein, would allow the prosecution to deprive an accused of access to an attorney, not just with respect to the decision to take the alcohol test, but for any and all purposes for which an attorney might assist in the crucial few

hours after arrest. Its broad application of Kentucky Revised Statute section 189A.110 permits an accused to be held incommunicado, without the ability to contact counsel or others in the outside world, until there is effectively no exculpatory evidence to preserve. Such an incommunicado hold not only deprives the arrestee of the assistance of counsel, but of the ability to make arrangements on his own for the preservation of evidence, or to contact others whose observations of the accused would provide important corroborating evidence of his physical state.

In cases with closely analogous factual situations, the necessity of an accused's ability to communicate with counsel and the outside world during the post-arrest period has been repeatedly upheld. See *State of Washington* v. *Fitzsimmons*, 93 Wash 2d 436, 610 P. 2d 893 (1980), where the court observed that the period immediately after the arrest is a critical stage in driving under the influence cases because of the unique character of the evidence to be obtained, since it must be obtained immediately or lost; *In re Newbern*, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80 (1959), and *In re Martin*, 58 Cal. 2d 509, 24 Cal. Rptr. 833, 374 P. 2d 801 (1962), where arresting officers refused to allow an accused to bring in a private physician at his own expense to have a sample of his blood taken. In each case, although the courts recognized that law officers need not assist the accused in obtaining an attorney or in his own efforts to preserve evidence, any attempt to thwart or interfere with those efforts constituted a violation of due process.

Although the judges below expressed the belief that Appellant had refused a breathalyzer test, such a finding does not affect these rights. It is universally acknowledged that the blood test sought by Appellant is a more accurate measure of blood/alcohol content than a breathalyzer. But more importantly, Appellant was deprived of an *independent* test, administered not by the officer seeking to convict him, but by an independent doctor or technician with no interest in the outcome of the case. And while a breathalyzer "refusal" may

have adverse consequences on a person's driving privileges, the Fifth Amendment to the United States Constitution mandates that cooperating with the police in their efforts to convict shall not be a precondition to the exercise of an accused's other rights.

CONCLUSION

The opinion of the Kentucky Court of Appeals, affirming the conviction of Appellant on the charge of driving under the influence of alcohol, should be reversed. Because Appellant was deprived of possible exculpatory evidence, which was destroyed by the passage of time, the error cannot be remedied by a new trial. For this reason, remand is not appropriate.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

86-CA-2821-DG

WILLIAM IRR
APPELLANT

v.

COMMONWEALTH OF KENTUCKY
APPELLEE

ON DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
HONORABLE GEORGE T. MUEHLENKAMP, JUDGE
ACTION NO. 86-X-014

AFFIRMING
(OPINION RENDERED: January 8, 1988; 10:00 a.m.)
NOT TO BE PUBLISHED

BEFORE: HOWERTON, Chief Judge; COMBS and WEST, Judges.

HOWERTON, CHIEF JUDGE. William Irr appeals from his conviction in the Campbell District Court for driving under the influence. As grounds for reversal, Irr asserts that he was denied bail for four hours under KRS 189A.110, which deprived him of effective assistance of counsel and his due process right to a fair trial. The Campbell Circuit Court affirmed Irr's conviction. We agree with the circuit court's decision and affirm.

William Irr, an Illinois resident, was arrested for driving under the influence of alcohol in Newport, Kentucky, on August 22, 1985, at approximately 2:40 a.m. He was tried by a jury and sentenced to a $250 fine. He appealed to the

Campbell Circuit Court, which affirmed the judgment. We granted discretionary review on the issue of the applicability of KRS 189A.110 in instances where no blood alcohol test is administered.

The pertinent facts are as follows: Irr was arrested by Newport Police Officer, Michael Henley. At trial, Officer Henley testified that Irr was "highly intoxicated," was staggering, and smelled of alcohol at the time of the arrest. Irr was taken to the police station where he was given a series of sobriety tests. He performed poorly on all of the tests. He was then requested to take a breathalyzer test. Officer Henley testified that Irr refused to take a breathalyzer test on three occasions and was advised of his rights regarding the test. Officer Henley recorded Irr's refusal. Irr was then transferred to the county jail.

Once in jail, Irr asked the deputy jailer, Thomas Bechtol, what would be his bond. Deputy Bechtol testified that he told Irr that the judge would have to set the bond, but usually it was a four-hour stay before release in a breathalyzer refusal situation. Deputy Bechtol further testified that Irr asked for a breathalyzer test but Bechtol said he was not trained to give the test and did not have a testing machine in the jail. Irr was released from jail at approximately 9:00 a.m. after posting bail set by the district court judge.

Irr contends that he was held in jail without bail pursuant to KRS 189A.110 which states; "[a]ny person who is arrested for a violation of KRS 189A.110 and who, upon blood alcohol testing shows a blood alcohol reading above .15 percent shall be detained in custody at least four (4) hours following his arrest." Irr argues that since he did not take a blood alcohol test, he could not be held pursuant to this statute and that had he been released on bond immediately, he could have obtained an independent blood alcohol test to prove his innocence. He argues that the denial of bond in his situation interfered with the preparation of his defense and violated his constitutional right to a fair trial. Additionally, Irr argues that the four-hour hold provision of KRS 189A.110 constitutes a denial of his sixth amendment constitutional right to effec-

tive assistance of counsel at a critical stage of the proceedings against him. He contends that exculpatory evidence in a DUI case must be gathered within the first hour or so of the arrest, thus this is a critical stage in the proceedings.

We disagree and affirm. Common sense indicates that Irr's arguments would make a mockery and a shambles of controlling the privilege of driving by drunk drivers.

Our Supreme Court has held that there is no right to counsel at the time a breathalyzer test is administered. *Newman* v. *Hacker*, Ky., 530 S.W. 2d 376 (1975). Administering the test is not such a critical stage from which counsel's absence might derogate from a defendant's right to a fair trial. Furthermore, we might add that time is of the essence for the Commonwealth as it is for the accused. The blood alcohol tests must be administered promptly. Even if an attorney was called and could attend, he would have to appear quickly.

Irr argues that if he had been released he could have obtained an independent exculpatory blood test. At 3:00 a.m. this is high speculation, but although KRS 189.520(7) provides that a person tested for blood alcohol may obtain an independent test by a physician of his own choosing, *Newman*, *supra*, also held that an individual who refuses to take a breathalyzer test is not entitled to take an independent test. *Newman*, at 377. Under *Newman*, Irr was not entitled to an independent test, and there was no special circumstance to warrant his immediate release or access to an attorney.

There is a dispute concerning Irr's desire to use a telephone. However, we fail to see how Irr's rights to counsel or immediate release were prejudicially violated. His bond was in fact set at $500, but he had no cash. His credit and credit cards were usable by him to obtain release at 9:00 a.m. We fail to understand how he could have been released much quicker.

Further, we agree with the circuit court's conclusion that KRS 189A.110 does not require Irr's release from jail upon his refusal to take a breathalyzer test. The statute allows for holding one charged with DUI for four hours if he/she

registers as much as .15 on the breathalyzer. Logic dictates that if the various sobriety test results indicate probable cause to believe the individual is intoxicated, and if an individual refuses the breathalyzer test, the authorities then can retain custody of the individual.

No individual has a natural and irrevocable "right" to operate a motor vehicle on public roadways. *E.g.*, *Ballow* v. *Reeves*, Ky., 238 S.W. 2d 141 (1951). It is "a privilege granted by a license of the state, subject to reasonable regulations by the state in exercise of its police powers." *Sturgill* v. *Beard*, Ky., 303 S.W. 2d 908, 909 (1957). KRS 189.110 is a reasonable exercise of the police power and it is not unreasonable to apply a four-hour sobriety period to one who has refused the breathalyzer.

In the face of Irr's refusal to submit to the breathalyzer test, we must balance the demands of public safety against an individual's personal liberties. If the authorities have probable cause to believe an individual is unfit to operate a motor vehicle and he refuses the breathalyzer, they may hold him for a reasonable period to regain his sobriety and the four-hour hold of KRS 189.110 is a reasonable period.

The judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

88-SC-55-D
(86-CA-2821-DG)

WILLIAM IRR

MOVANT

v.

COMMONWEALTH OF KENTUCKY

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movant for a review of the decision of the Court of Appeals is denied.

ENTERED February 23, 1988.

/s/ ROBERT F. STEPHENS
Chief Justice

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

NO. 86-X-014

COMMONWEALTH OF KENTUCKY,
Plaintiff/Appellee,

vs.

WILLIAM IRR,
Defendant/Appellant.

JUDGMENT
(Entered October 22, 1986)

Appellant was tried and convicted by a jury in the Campbell District Court of Driving Under the Influence. Defendant has furnished us with a comprehensive and well written memorandum outlining his arguments. The difficulty is that he assumes, and in fact states, that "this Court need not decide whether appellant agreed or refused to take a breathalyzer . . ." We believe that such a determination is of the utmost importance to this appeal and find that, although the defendant maintains that he agreed to take the breathalyzer test, the evidence is overwhelming that he refused the test on three occasions. It should also be noted that the defendant agrees that he had no right to have an attorney present for the administering of the breathalyzer test.

Having found that the defendant did, in fact, refuse to take the breathalyzer test, this case is readily disposed of by *Newman* v. *Hacker*, Ky. 530 SW 2d 376 (1975). Defendant contends that he was denied due process because he was denied counsel. He argues that if he had an attorney present, he could have secured a blood test which would have shown things favorable to him. *Newman* says that the blood test provisions of the statute are not applicable when a defendant refuses a breathalyzer test.

Defendant maintains that K.R.S. 189 (a).110 requires his release from jail if a blood alcohol test is refused. What the statute says is that if the blood alcohol is above .15 that the defendant can be held for four hours. It says nothing about the right of a defendant to immediate release if the test is refused. Simple logic dictates that if the test result shows reason for the authorities to hold a defendant and that if a defendant refuses the test, the authorities then can and should retain custody of the defendant if they have probable cause to believe that the defendant is under the influence. It would product incongruous results if the statute were interpreted to mean that a person being held under probable cause can continue to be held if he submits to a test which confirms the probable cause but *must* be released if the probable cause holding cannot be confirmed due to the refusal of the defendant to submit to the test. Finally, the defendant contends that he was deprived of the right to a blood test. Again, as pointed out above, this is answered by *Newman*.

The Judgment of the lower court is affirmed.

/s/ GEORGE MUHLENKAMP
JUDGE

I, Thomas J. Calme, Clerk of the Campbell County Circuit Court, do hereby certify that a true copy of this Judgment was mailed/hand delivered to Justin Verst, Stephen Schiller and Judge Lambert Hehl, this 22nd day of October, 1986.

/s/ THOMAS J. CALME, Clerk

CAMPBELL DISTRICT COURT
DIVISION NO. TWO

CASE NUMBER 85-T-2956

COMMONWEALTH OF KENTUCKY
PLAINTIFF

vs.

WILLIAM IRR
DEFENDANT

JUDGMENT AND SENTENCE
(Filed June 23, 1986)

It having been brought to the attention of this Court that the Court, on May 14, 1986, entered a "Trial and Verdict" herein, but that it erroneously failed to enter a Judgment and Sentence thereon, it is hereby

ORDERED AND ADJUDGED that, based upon the Verdict of the Jury, Defendant William Irr is hereby adjudged Guilty of the offense of driving while under the influence of alcohol. His sentence is hereby fixed at a fine of $250.00, as well as a service fee of $150.00, and court costs.

/s/ LAMBERT HEHL
JUDGE

cc: Paul Twehues
Steven Schiller

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

ACTION NO. 86-CA-2821-DG
(KENTUCKY SUPREME COURT NO. 88-SC-55-D)
(CAMPBELL CIRCUIT COURT NO. 86-X-014)

WILLIAM IRR

APPELLANT

vs.

COMMONWEALTH OF KENTUCKY

APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed March 25, 1988)

Notice is hereby given that William Irr, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Decision entered by the Kentucky Court of Appeals dated January 8, 1988, affirming the decision entered in Campbell County Kentucky Circuit Court, Action No. 86-X-014, affirming the conviction of Appellant in Action No. 85-T-2956. The Supreme Court of Kentucky entered an Order dated February 23, 1988 denying discretionary review of said Decision.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ STEVEN L. SCHILLER
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401 York Street
Newport, KY 41071
(606) 261-6811

CERTIFICATION

I hereby certify that I have mailed a copy of the foregoing to Paul Twehues, Campbell County Attorney, and Attorney for Appellee Commonwealth of Kentucky, The Clerk of the Supreme Court of Kentucky, the Clerk of the Kentucky Court of Appeals, and the Clerk of Campbell County, Kentucky Circuit Court, on this 24th day of March, 1988. I further certify that all parties required to be served have been served.

/s/ STEVEN SCHILLER

I, John C. Scott, Clerk, Court of Appeals, certify that copies of the Notice of Appeal as filed in this Court on March 25, 1988, have been mailed to Frederic Cowan, Paul H. Twehues, Jr., Steven L. Schiller, and Joseph F. Spaniol, Jr., this 29th day of March, 1988.

JOHN C. SCOTT, Clerk
By: /s/ JEANETTE MULLEY
Chief Deputy Clerk